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No. 04-423

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IN THE

Supreme Court of the United States

CHINA NORTH INDUSTRIES CORP.,
a Chinese entity a/k/a Norinco,

Petitioner,

v.

LILIAN S. ILETO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *iv* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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I. REPLY TO RESPONDENTS' FACTUAL BACKGROUND

As a preliminary matter, certain of the statements made in Respondents' Factual Background warrant clarification. Respondents' allegations of Petitioner's affirmative negligence are virtually exclusively grounded in one assertion: Petitioner "*know[s]* from crime gun traces" that certain distribution channels are "corrupt," and that, armed with this knowledge, Petitioner affirmatively seeks out these channels so as to create an illegal "secondary market" in firearms. *See* Resp'ts' Brief in Opp'n at 7 (emphasis added). Importantly, substantially all of Respondents' allegations of Petitioner's affirmative misconduct are rooted in Petitioner's purported knowledge of the contents of the crime gun trace data ("Trace Data") collected by the Department of Justice, Bureau of Alcohol, Tobacco, and Firearms ("ATF"). *See e.g.*, Record 15-16 ¶ 32; Record 17-21 ¶¶ 40 –57, Record 22-24 ¶¶ 62-68.

Based on public records of which this Court may take notice,[1] these allegations are unsupportable conclusions. First, assuming *arguendo* that the Federal Firearms Licensees ("FFLs") actually contribute in any significant manner to the illegal secondary market in firearms,[2] Petitioner would have had no access to ATF Trace Data that identified which FFLs were "corrupt."[3]

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1. "Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record." *Papasan v. Allain*, 478 U.S. 265, 269 n.1 (1986).

2. *See* Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277 (2001).

3. For a detailed review of the ATF's Trace Data and its statistical import see generally Cook & Braga, *supra*.

Second, this Court may also take notice of the fact that, as a foreign manufacturer, Petitioner *would not receive any Trace Data* from the ATF because such Trace Data requests are directed instead to the importer of the firearm. *See NAACP v. Acusport Corp.*, 210 F.R.D. 268, 275 (E.D.N.Y. 2002). Respondents have not alleged that Petitioner imported any firearms, much less the firearm in question.

Third, no compiled Trace Data showing crime patterns by distributor or retailer are publicly available. *See* Bureau of Alcohol, Tobacco, Firearms, and Explosives, Dep't of Justice, Youth Crime Guns Interdiction Initiative (YCGII), *available at* http://www.atf.treas.gov/firearms/ycgii.htm (last visited Dec. 12, 2004). *Id.* Indeed, although the ATF might notify a federal firearms licensee ("FFL") that an *individual* trace has been initiated by law enforcement personnel if a firearm is not already found in the ATF's database, FFLs have only minimal and partial information on these individual traces—nothing more. *Id.*

II. REVIEW IS MERITED AT THIS STAGE OF THE PROCEEDINGS TO FORESTALL A FEDERAL COURT'S IMPROPER USURPATION OF POWER RESERVED TO THE STATES.

In the decision below, the en banc majority of a profoundly divided Court of Appeals for the Ninth Circuit, in violation of well-established principles of federalism, adopted a broad new theory of policy-driven liability, arrogating to itself matters reserved to state legislative policy judgment.

At its core, the Respondents' theory reveals a desire to use a flexible common law to advance public policy and thereby "to convince courts to interfere where legislatures have consciously determined not to tread." Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and*

Sale of "Assault Weapons," 8 STAN. L. & POL'Y REV 41, 48 (1997). Unfortunately, the Ninth Circuit majority nullified California law and frustrated the collaborative goals of state and federal legislative gun control schemes in the process.

A. The Procedural Posture of this Case Is No Bar to Review and Review Is Necessary to Secure Uniformity of Decision

Contrary to the Respondents' assertions, the procedural posture of this case is no bar to review by this Court. Where, as here, a case is of such peculiar gravity and general importance, or where review is necessary to secure uniformity of decision, review by this Court at this state of the proceedings is both merited and appropriate. Indeed, this Court has repeatedly (indeed, recently) granted certiorari when the case is presented, as here, after a court of appeals has either affirmed a lower court's order denying a motion to dismiss or reversed a lower court's entry of a dismissal order. *See, e.g., Republic of Aus. v. Altmann*, 124 S. Ct. 2240, 2243 (2004); *Tennessee v. Lane*, 124 S. Ct. 1978, 1983-84 (2004); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004).

Moreover, review by this Court is necessary to secure uniformity of decision. As stated in the Petition, virtually all other federal courts of appeal presented with these same or substantially similar claims have declined to find liability, in light of the importance of deferring such a policy decision to legislative judgment. The split among courts has deepened since the filing of the Petition. Quite recently, the Illinois Supreme Court refused to recognize claims similar to those at issue in this case, in part, out of deference to the state legislature. *Young v. Bryco Arms*, 93678, 2004 Ill. LEXIS 1664 at *33-34 (Ill. Nov. 18, 2004). The split in authority among the courts on a critical issue of national power and federalism warrants a grant of review by this Court.

B. Review Is Merited Because the Error by the Court Below Is Fundamental to Further Adjudication

Review is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case. *Am. Constr. Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 251, 258 (1916). The Ninth Circuit majority's unprecedented departure from well-established law in matters of policy concern commends judicial review. *Cf. Leavitt v. Jane L.*, 518 U.S. 137 (1996) (commenting on the necessity for review where "the underlying substantive issue in this case is a controversial one, generating a kind of hydraulic pressure that motivates ad hoc decisionmaking").

Respondents allege that Petitioner failed to take all possible steps that might have prevented the injury to Respondents from Mr. Furrow's criminal act. *See* Resp'ts' Brief in Opp'n at 6-8. However, the California Supreme Court has expressly rejected such "abstract negligence cases," holding that in such cases the defendant's misfeasance is not a cause in fact of the criminal act.[4] *See Saelzer v. Advanced Group 400*, 25 Cal. 4th 763, 775-76 (2001); *accord Nola M. v. Univ. of S. Cal.*, 16 Cal. App. 4th 421, 435 (1993). The policy reason for this limitation of tort law is clear: "It is an easy matter to know whether a stairway is defective and what repairs will put it in order . . . but how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?" *Noble v. L.A. Dodgers, Inc.*, 168 Cal. App. 3d 912, 918 (1985) (quoting *Goldberg v. Hous. Auth. of Newark*, 38 N.J. 578, 589 (1962)).

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4. The Respondents' Brief in Opposition offers a detailed exegesis of tort duty under California law. *See* Resp'ts' Brief in Opp'n at 14-22. Our response is that this discussion is largely irrelevant, absent a meaningful discussion of causation. *See, e.g., Nola M.*, 16 Cal. App. 4th at 438 (1993) (finding a duty but rejecting liability where there was no causation).

The nuisance issue "is simple" and should have been disposed of by the Ninth Circuit "easily." *See* App. A at 67a (Hall, J., dissenting). Respondents claim that because *City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575 (1994), was a private nuisance action, it does not bar the action here. However, *U.S. Gypsum's* holding is much broader than Respondents represent it—California law does not "allow[ ] recovery for a defective product under a nuisance cause of action," public or private. *Id.* at 586.

Courts nationwide have likewise overwhelmingly refused to expand the definition of nuisance, public or private,[5] to include products liability actions. Such an expansion would impinge on state policy concerns by nullifying both the statute of limitations as well as the economic loss doctrine. *See, e.g., Detroit Bd. of Ed. v. Celotex Corp.*, 493 N.W. 2d 513, 521 (Mich. App. 1992) (stating that "[s]tatutes of limitation are founded in public needs and public policy, and the public would not be served by neutralizing the limitation period by labeling a products liability claim as a nuisance claim" (citation omitted)).

In a decision issued since the filing of the Petition, which could not conflict more directly with the majority's opinion below, the Illinois Supreme Court recently articulated the policy justifications for denying public nuisance liability to the distribution of firearms. The Illinois Supreme Court stated as follows:

> We are reluctant to interfere in the lawmaking process in the manner suggested by plaintiffs, especially when the product at issue is already so

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5. "[C]ourts enforce the boundary between public nuisance law and product liability" *City of Phila. v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2001); *accord Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 540-41 (3d Cir. 2001).

> heavily regulated by both the state and federal governments. We therefore conclude that there are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms.

Young v. Bryco Arms, No. 93678, 2004 Ill. LEXIS 1664 at *33-34 (Ill. Nov. 18, 2004). California law is in accord with *Young*. "[C]ompelling reasons of policy require that the responsibility for establishing those standards of public morality, the violations of which are to constitute public nuisances within equity's jurisdiction, should be left with the legislature." *People v. Lim*, 18 Cal. 2d 872, 879-80 (1941).

The Ninth Circuit's imposition of both negligence and nuisance liability in disregard of the policy concerns inherent in its decision makes this truly an "extraordinary case." *Leavitt*, 518 U.S. at 144-45. This case is fully deserving of this Court's review, under *Leavitt*, at this point in the proceedings.

III. THE TORT DUTY CREATED BY THE NINTH CIRCUIT MAJORITY IMPINGES UPON ISSUES RESERVED TO A STATE LEGISLATURE

A. Government Code § 53071 Bars This Common Law Licensing Scheme

The Respondents seem to have misread our brief. We never said that CAL. GOV. CODE § 53071 occupies "the whole field of regulation of firearms," Resp'ts' Brief in Opp'n at 12. Rather, we said that under § 53071 "it is expressly 'the intention of the Legislature to occupy the whole field of the registration or licensing of firearms, as encompassed by the provisions of the penal code." Pet. at 9-10 (quoting CAL. GOV. CODE § 53071). Yet, the tort duty imposed by the Ninth Circuit majority is an

attempted common law overlay to the licensing statutes that are encompassed by the California Penal Code.[6]

Respondents' argument that § 53071 bars only municipal ordinances, but does not bar judicial action, is unsupportable. *See I. E. Assocs. v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 285 (1985) "[General] and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." Courts may interpret these statutes and regulations, but are without power to create any common law gun control licensing regimes and/or overlays.

Furthermore, *Galvan v. Superior Court*, 70 Cal. 2d 851, 869 (1969), goes even further. In *Galvan*, as in this case, the California Supreme Court was urged to adjudicate the issue of gun control with reference to evidence that the imposition of more rigorous controls was desirable because it might deter crime. The court refused to consider the matter: "It is well established that the wisdom of legislation is beyond the competence of the court." *See id.* at 869.

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6. Title 2, Article 1, Chapter 4 of the California Penal Code, titled, "Licenses to Sell Firearms," comprehensively covers the entire subject matter of the manner and means in which FFLs may operate every facet of their businesses in the State of California. Title 2 comprehensively covers *all* of the activities discussed in the Respondents' Complaint. *See e.g.*, CAL. PENAL CODE § 12070, 12071.1, 12071.4 (gun show sales); § 12070 (due diligence procedures, safety instructions, restrictions on multiple sales, and specific warnings required to be posted by FFLs); § 12072 (straw purchasers); § 12073-77 (recordkeeping requirements); § 12078 (sales to law enforcement agencies); § 12081 (sales for use as props); § 12082, 12084 (aftermarket sales).

B. Civil Code § 1714.4 Bars Claims Grounded in Negligent Marketing or Distribution

To the extent that any of Respondents' claims is not barred as a licensing regime, it is otherwise barred by virtue of § 1714.4 as grounded in a defect of either the design or the manufacture of the firearm and merely reformulated "as one for negligent distribution to the general public." *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 481 (2001). Indeed, "products liability includes manufacturer's negligence in 'marketing a product because of the way it was designed." *Id.* 481-82 (quoting PROSSER & KEETON, TORTS § 96 (5th ed. 1984)).

Here, for example, the Respondents' allegations that Petitioner should have restricted its sales of firearms so as to minimize potential harm from a dangerous product sound in product liability and are therefore barred under § 1714.4. *See* Record 32 ¶ 103. Likewise, Respondents' claim that the firearms are negligently designed due to their particular features is identical to a claim raised by the plaintiffs and rejected in *Merrill*. *Compare Merrill*, 26 Cal. 4th at 480 *with* Record 26-27 ¶ 83. As such, *Merrill* controls this case and 1714.4 bars the action.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant its Petition for a writ of certiorari.

Respectfully submitted,

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